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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

NOTICE OF MOTION AND SUBMISSION.

To Mr. W. E. Norvell, Jr., Attorney for Mrs. Mary Kennedy, Administratrix:

Please take notice that upon certified copy of the transcript of the record herein and upon the annexed petition of the above-named petitioner and the brief attached thereto, the undersigned, on behalf of the said petitioner (having filed said petition, record and motion prior to June 25, 1923), will present or will have the Clerk of the Supreme Court of the United States present the annexed petition for a writ of certiorari to and move the motion hereto annexed before the Supreme Court of the United States in the City

of Washington, District of Columbia, on the first motion day after June 25, 1923 (which will probably be Monday, October 1, 1923), or as soon thereafter as counsel can be heard, and in support of said motion will present to said Court said transcript, petition and brief annexed thereto, copies of which motion, petition and brief are herewith served upon you.

This the 6th day of June, 1923.

FITZGERALD HALL,
Counsel for Petitioner.

Received copy of the above notice, together with the motion, petition and brief, and due and sufficient notice both of the filing and submission of the petition is hereby admitted as of the 8th day of June, 1923.

W. E. NORVELL, JR.,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

MOTION FOR WRIT OF CERTIORARI.

Now comes the above-named petitioner, by Fitzgerald Hall, his counsel, and moves the Court upon a certified copy of the transcript of record herein, and upon the annexed petition, brief and notice, for a writ of certiorari directed to the Supreme Court of the State of Tennessee to bring before this the Supreme Court of the United States the record in the proceedings entitled "John Barton Payne, Agent, Petitioner, versus Mrs. Mary Kennedy, Administratrix, Respondent, Davidson County Law No. 18," in the said Supreme Court of the State of Tennessee,

wherein final decree was rendered against your petitioner on May 26, 1923, for review and for such other proceedings thereon as to the Court may seem just and for such other and further relief in the premises as justice may require.

JAMES C. DAVIS, Agent.

By FITZGERALD HALL,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

James C. Davis, Agent,

Petitioner.

versus

Mrs. Mary Kennedy, Administratrix,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James C. Davis, Agent,[1] respectfully shows to this Honorable Court the following:

This case was instituted by Mrs. Mary Ken-

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[1]The suit was originally instituted against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Agent, jointly. It was dismissed as to said Railway because the cause of action, if any, accrued during Federal control of railroads. James C. Davis, Agent, was substituted for John Barton Payne, his predecessor in the office of Director General of Railroads and agent under Section 206 of the Transportation Act.

nedy, Administratrix of the estate of her deceased husband, Dave Kennedy, in the Circuit Court of Davidson County, Tennessee, against the Director General of Railroads to recover damages for the death of her husband, who was killed July 9, 1918, while acting as engineer of one of the Director General's trains. The suit was predicated solely upon the Federal Employers' Liability Act. (R., 37-47.)[1]

There was a verdict and judgment of $8,000 in favor of the plaintiff. (R., 9.) This was reversed by the Court of Civil Appeals—an intermediate appellate court—for error in the charge. (R., 456-459.)

Each party filed a petition for writ of certiorari in the Supreme Court of Tennessee. (R., 461, 516.) Both petitions were allowed and writs issued. (R., 525.) On May 26, 1923, the Supreme Court, the highest court in the State, reversed the Court of Civil Appeals and affirmed the judgment of the trial court, rendering final judgment against your petitioner. (R., 542.)

Your petitioner is advised that said judgment

[1]Page references refer to the side paging of the printed record.

or decree of the Supreme Court of Tennessee is final and erroneous, and that a "title, right, privilege or immunity" was specially set up and claimed under a statute of the United States, namely, the Federal Employers' Liability Act, hence files this his petition for writ of certiorari pursuant to the provisions of Section 237 of the Judicial Code, as amended, and the rules of this Honorable Court.

The Questions Presented are Purely Legal and of General Application

We ask no review of the facts. The statement of the case by the Supreme Court of Tennessee in its opinion is full and fair. (R., 526-531.)

But it has, we believe, announced two principles of law that are erroneous and of such general application as to warrant this Court in reviewing them.

1. It announced as a rule of law that under the Federal Employers' Liability Act the doctrine of assumption of risk applied only to the negligence of a party plaintiff and not to the neg-

ligence of a defendant or of plaintiff's fellow servants, saying:

> "If the engineer (or his dependents) could be barred of recovery at all in this case on the assumed risk doctrine it would seem to be on the theory only that the engineer assumed the risk of his own negligence, or, expressing it differently, that he assumed the risk of his own violation of the rules of the company and his duty." (R., 534.)

The court apparently fell into this error by relying on a case based jointly on the Federal Employers' Liability Act and the Federal Safety Appliance Acts. (R., 534.) It did not appreciate that such cases as *Boldt v. Pennsylvania Railroad*, 245 U. S., 441, 445, and *Pryor v. Williams*, 254 U. S., 43, clearly hold that, where there is no violation of the Safety Appliance Acts, the doctrine of assumption of risk applies to the negligence of a defendant, even if the negligence be that of a plaintiff's fellow servants.

2. The trial judge on the measure of recovery charged the jury to "make such pecuniary allowance therefor as *in your opinion is warranted by the evidence.*" (R., 438.) The Court of

Civil Appeals held this to be error, because the quantum of recovery as thus given was not "compensation," as it should have been, but only the "opinion" of the jury. (R., 456-459.) The Supreme Court admits this to be error, but concludes that it was harmless error, because the record does not affirmatively show that the error was prejudicial. (R., 540.)

Erroneous instructions are presumptively injurious. *Fillippon v. Albion Vein Slate Company*, 250 U. S., 76, 82. There is no presumption that the same result will follow where the law is applied and where it is misapplied. *Louisville & Nashville v. Greene*, 244 U. S., 523, 554.

It would seem clear that had the case been predicated on the common law or a state statute the Supreme Court of Tennessee would have affirmed the Court of Civil Appeals. *Railroad v. Witherspoon*, 112 Tenn., 128, 137; *Jones v. State*, 128 Tenn., 493, 498; *Railway & Light Co. v. Dungey*, 128 Tenn., 587, 596; *Memphis Street Ry. v. Carroll*, 141 Tenn., 265, 269.

But the court seems to think that a *different rule* applies in a case under the Federal Employers' Liability Act.

We insist that in a suit under said Act, even in a state court, we have the absolute right to go to the jury with the law on vital issues correctly charged, else the legal right of trial by jury[1] is an idle and meaningless phrase. Of what avail is a jury trial where the court's instructions are affirmatively erroneous? Of what avail is the right of trial by jury if courts assume that a jury would have returned the same verdict whether the law had been given them correctly or incorrectly?

Your petitioner is advised that the decree or judgment of the Supreme Court of Tennessee is final and erroneous, and that it has no remedy save in filing this petition for a writ of certiorari to require the case to be certified to this Honorable Court for review and determination.

Your petitioner presents herewith as a part of this petition a brief and formal specification of errors showing more fully its views upon the questions involved and a certified transcript of the complete record in the Supreme Court of

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[1]Section 3 of Chapter 149, Act of April 22, 1908, U. S. Compiled Statutes, Section 8659, is conclusive that Congress expected suits under the Federal Employers' Liability Act to be tried by jury.

Tennessee and all proceedings thereon, together with proof of service of notice of the submission of this petition conformably to the rules of this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Tennessee, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Tennessee in this case, which was entitled in that court "John Barton Payne, Agent, Petitioner, vs. Mrs. Mary Kennedy, Administratrix, Respondent, Davidson County Law Number 18," to the end that said cause may be reviewed and determined in this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of the State of Tennessee may be reversed by this Honorable Court.

No writ of supersedeas is needed in this case, but your petitioner hereby specifies its willing-

ness to make bond in any amount for any purpose as the Court may require.

JAMES C. DAVIS, Agent.
By FITZGERALD HALL,
Counsel.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

Fitzgerald Hall, being duly sworn, according to law, on his oath says:

I am the General Counsel of The Nashville, Chattanooga & St. Louis Railway, and as such am counsel for James C. Davis, Agent, in the above cause. I have prepared the foregoing petition, and the statements therein are true of my own knowledge and belief, and I verily believe the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

FITZGERALD HALL.

Sworn to and subscribed before me, this 6th day of June, 1923.

W. A. MILLER,
[Seal] Notary Public.

My commission expires October 2, 1926.

BRIEF.

STATEMENT OF THE CASE.

We quote and adopt the following from the opinion of the Supreme Court of Tennessee:

> "This action was instituted under the Federal Employers' Liability Act in the Circuit Court of Davidson County, by Mrs. Mary Kennedy, as administratrix of the estate of her husband, David Kennedy, against The Nashville, Chattanooga & St. Louis Railway and John Barton Payne, Federal Agent, to recover $25,000.00 damages for the death of her husband, a locomotive engineer, who was killed in a collision of two trains of the N., C. & St. L. Railway, on one of which he was engineer.
>
> "In the Circuit Court the jury found the issues for Mrs. Kennedy and assessed her damages at $8,000.00, and the court gave judgment therefor. *The Court of Civil Appeals reversed the case because of an erroneous instruction and remanded it for a new trial.*
>
> "The accident occurred at about 7:20 A.M. on July 9, 1918, at a point about four miles west of Nashville, when west-bound

passenger train No. 4 collided, head on, with east-bound passenger train No. 1.

"Passenger train No. 4 is a west-bound train due to leave the Union Station at Nashville at 7: 00 o'clock in the morning, daily. Passenger train No. 1 is a train due to arrive at the Union Station at Nashville, from the west, at 7: 10 A.M. daily. Under normal circumstances these trains pass each other a short distance west of Nashville. The Railway is double-tracked for a distance of 2½ miles west of Nashville, between the Union Station and a point called 'Shops.' Beyond Shops the Railway is single-tracked. At Shops there is located a tower in charge of an employee, who, under orders from the train dispatcher at Nashville, sets the switches which permit trains to pass from the double tracks to the single track, and from the single track to the proper double track. He also operates a signal device or semaphore, the sole purpose of which is to indicate to trainmen whether or not the switch in front of the train is so set as to enable the train to go forward upon the proper track, if the approaching train has the right to go upon the track. The right of the train to go upon the track is derived from train orders or from schedules and not from the signal device. By the

schedules and rules of the Railway passenger train No. 1, due to arrive at Nashville at 7: 10 in the morning, was a superior train and had the right of way over train No. 4, due to leave Nashville at 7: 00 in the morning. In other words, train No. 1 could proceed on the assumption that train No. 4 would be out of the way.

"In order to prevent train No. 4 from proceeding west of Shops before train No. 1 had arrived at Shops, the crew of train No. 4 had positive instructions never to pass Shops unless they knew as a fact that train No. 1, in the opposite direction, had passed Shops in the direction of Nashville. If the crew of train No. 4 were uncertain or did not know that train No. 1 had been passed between Shops and Nashville, it was their duty to stop their train at Shops and telephone the train dispatcher at Nashville for orders. Under this system of operation it was incumbent upon the train crew to recognize, by the use of their senses of sight and hearing, train No. 1 as it passed them going in an opposite direction on a parallel double track. In case they passed other trains than train No. 1, and similar in appearance, it was, of course, under the system above outlined, incumbent on the train crew to distinguish such other train from train No. 1.

This system placed a heavy responsibility and duty upon each member of the train crew. This duty to recognize train No. 1 was upon the conductor, engineer, fireman and flagman. All of these men obviously had other duties to perform. The conductor was required to go through his train and collect tickets and fares. The engineer, seated on the right of the cab of the engine, in addition to keeping a look-out, was concerned with the performance of his engine, the speed and the various gauges in front of him. The fireman, in addition to his duties of keeping a look-out, was required to shovel fuel into the firebox. The flagman was required to protect the rear of the train and to assist the conductor. The safety of the train, the lives of the crew and the passengers depended upon the correctness of the crew's judgment in recognizing and distinguishing train No. 1 as they passed it. A mistake in this respect would almost certainly result in a collision. Hence it was a wise precaution to place the duty to recognize, distinguish and know upon each member of the crew, and not upon one member.

"On the morning of the collision, the crew of train No. 4 consisted of Conductor Eubanks, in charge of the train, Engineer Kennedy, Fireman Meadows, Flagman Sinclair.

The train left the Union Station at Nashville at 7: 05 A.M., five minutes before train No. 1, coming into the Union Station from the west, was due to arrive. Just before train No. 4 pulled out Conductor Eubanks and Engineer Kennedy were each handed a train order, which read:

" 'No. 4 engine 282 hold main track Meet No. 7 Eng. 215 at Harding. No. 1 has Eng. 281.'

"The conductor and engineer read the order to each other; the conductor gave his copy to the flagman, and the presumption is that the engineer read his copy to the fireman.

"Harding, the point where No. 4 was to pass No. 7, is west of Shops and west of the point of the collision, and this part of the train order does not enter into the matter. The only reference to train No. 1 was that it had Engine 281. From this, in the circumstances, it is to be inferred that the crew of No. 4 must recognize these numbers, which are about ten inches high, on the engine of train No. 1 while passing at a speed of from 20 to 30 miles an hour. To see the numbers was the only positive identification. If the crew did not see them it was their duty to stop the train at Shops. They did not see them and they did not stop their

train at Shops, because their train collided with No. 1, pulled by Engine 281, some two miles west of Shops.

"Train No. 4 was crowded with passengers en route from Nashville to a large government war plant near Nashville. Conductor Eubanks was working his way through the coaches collecting tickets and fares when at a point between Union Station and Shops something passed on the parallel track going in the direction of Nashville. At this moment, the conductor had started to take tickets from the smoking compartment, and when he heard the noise of a train passing he tried to look out the window to determine whether or not it was train No. 1. He saw 'something with steam,' but was unable to identify it. He heard the noise and saw the steam, but was unable to say whether it was a train similar in appearance to No. 1, or a switch engine, or an engine with cars attached, but he assumed it was No. 1 and continued to take up tickets. He testifies that he relied upon and had confidence in the engineer, Kennedy, because he had explained to Kennedy the crowded condition of the coaches and had requested Kennedy to look out for No. 1, and Kennedy had agreed to do so. Also he testifies that he relied on the other mem-

bers of the train crew, whose duty it was to look out for No. 1.

"When No. 4 arrived at Shops the semaphore signal was set at proceed, which only meant to the crew of No. 4 that if they had the right to go upon the single track west of Shops it was physically possible to do so, and that the switches were properly set for such movement. No. 4 proceeded to pass Shops, going at about 20 or 25 miles per hour. The towerman called up the dispatcher, and the dispatcher instructed him to stop No. 4 if he could. He blew an emergency whistle, which failed to attract the attention of No. 4. A switch engine also blew and some persons attempted to wave No. 4 down, without avail, and it collided, head on, with No. 1 at a point about 1½ miles from Shops, and within three or four minutes after it had passed Shops. A number of people were killed and injured, among them the engineer Kennedy, and the fireman, Meadows, members of the crew of No. 4. The flagman, Sinclair, disappeared; hence conductor Eubanks is the only member of the train crew who testified.

"In the petition for certiorari, and in the assignments of error, brief and argument of the petition, it is said on page 72:

" 'Under the rules and the established

practice, it was Engineer Kennedy's absolute, invariable, non-delegable duty to be on the lookout and not to pass the Shops until he *personally knew* that train No. 1 had come off the single track. He was unburdened with any duties that would interfere with the continued and effective lookout which it was his duty to keep. There was no emergency, nothing to distract his attention from the rules and customary practice of stopping at the end of the double track unless he had personal knowledge—which of course he did not—that train No. 1 had already passed.'

"On page 73:

" 'There was no negligence on the part of defendants, but the sole, only and proximate cause of this titantic disaster was the criminal negligence of Engineer Kennedy, who, throwing caution to the wind, violated all rules, established practice, and every dictate of common sense and ordinary care.'

"On page 78:

" 'It was his absolute duty, not only to look out, but to know definitely, of his own personal knowledge, whether train No. 1 had passed before he entered the single track.'

"In reference to the conductor, it is said on page 78:

" 'The train being crowded, he commenced taking up tickets immediately after leaving the depot. This was his duty and did not constitute negligence. At the point near which Trains Nos. 1 and 4 customarily passed—it being a piece of perfectly straight track—'something with steam' passed. Conductor Eubanks made an effort to see what that was, but on account of paramount physical limitations, due to the fact that he was inside a vestibule train (not on the lookout ahead as the engineer), which was, due to war conditions, very much crowded, he could not see whether it was Train No. 1 or not, but *he supposed*, and, we submit, naturally and properly so, that it was Train No. 1. He proceeded to take up his tickets, and knew nothing was wrong until the emergency brake went on and the collision occurred.'

"The declaration undertakes to point out specifically the negligence relied upon, and charges the fireman, flagman, conductor and the operator at Shops with specific negligence. The defendants emphatically deny negligence upon the part of any one except the engineer, whom they charge with gross and wanton negligence, which they claim was the sole negligence and the sole proximate cause of injury.

"Defendants say, however, that it was the duty of the engineer absolutely to know whether or not he passed No. 1, yet, as far as we can discover, if it was the engineer's duty to absolutely know, it was also the absolute duty of the conductor, as well as other members of the crew, absolutely to know, and even if it be true that the other duties, position and surrounding conditions of the engineer made it simpler for him to know than the other members of the crew, nevertheless the duty upon the other members to know was imposed upon them by the company, and, as far as the evidence shows, was accepted by them without qualification." (R., 526-532.)

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Tennessee erred in announcing as a principle of law that in a suit based on the Federal Employers' Liability Act an injured employee could only assume the risk of his own negligence and that he could not in any event assume the risk of the negligence of a defendant and of his, the plaintiff's, fellow servants. (R., 534.)

2. The Supreme Court of Tennessee erred in holding it to be harmless error to leave it to a jury to determine the size of the verdict without the statutory limitation of "compensation," the jury being affirmatively limited only to "such pecuniary allowance therefor as in your opinion is warranted by the evidence." (R., 438, 540.)

ARGUMENT.

I.

Our case here is in narrow compass. We contend that the deceased engineer, Kennedy, assumed the risk of the danger created by the negligence of himself and his fellow servants. The Supreme Court held that the doctrine of assumption of risk was not applicable—not because of the facts of the case, *but because under the Federal Employers' Liability Act that doctrine was never applicable to the negligence of a defendant or of a fellow servant.* To support that conclusion the Supreme Court relied solely on *Spokane, etc., R. R. v. Campbell*, 241 U. S., 497. (R., 534.) In the Campbell case the doctrine of assumption of risk could not be successfully invoked because of the violation of the Safety Appliance Acts. In the case at bar there was no claim that there was a violation of the Safety Appliance Acts, the case being predicated alone upon the Federal Employers' Liability Act.

That the Supreme Court of Tennessee announced an erroneous rule of law is obvious from an inspection of the following cases:

Seaboard Air Line v. Horton, 233 U. S., 492, 508.
Great Northern v. Wiles, Admr., 240 U. S., 444, 448.
Jacobs v. Southern R. R., 241 U. S., 229.
Chesapeake & O. R. R. v. DeAtley, 241 U. S., 310.
Boldt, Admrx., v. Pennsylvania R. R. Co., 245 U. S., 441, 445.
Pryor v. Williams, 254 U. S., 43.

We repeat the facts:[1]

Petitioner's trains Numbers One and Four collided head-on on a single main line track about four miles from the Union Station at Nashville, at 7: 20 A.M., July 9, 1918. Train Number One, being south-bound (or east), was under the rules superior to Train Number Four, north-bound (or west). (R., 95, 113, 115, 206.)

From the Union Station at Nashville to the petitioner's Shops, a distance of about two and one-half miles, there is a double track main line. Beyond that point for several miles is a single line of main track. (R., 207-209.)

[1]For the convenience of the Court we cite the record supporting the facts as found by the Tennessee Supreme Court. We concur absolutely in that court's statement of the case.

Between the Union Station and the Shops said two trains operate in a block system, controlled and under the direction of the Chief Dispatcher. Beyond the Shops said trains operate on schedule or train orders. (R., 164, 207, 310.)

It was the personal, non-delegable duty of the engineer of train Number Four to know that train Number One had passed before leaving the double track, and the rules and invariable custom required the engineer to stop his train at the Shops and proceed no further without orders *unless he himself personally knew that said train Number One had passed.* (R., 126, 131, 150-151, 164-167, 220, 254, 261, 268, 272, 274-276.)

Train Number Four had no right to leave the double track and enter the single track. Engineer Kennedy violated the written rules, the established custom and practice (with which he was perfectly familiar), with the train order (which he had read a few minutes before) in his hand, and without excuse or justification, apparently with his eyes open, he drove his train into what any reasonable person in his position is bound to have known was a veritable death-

trap. (R., 126-128, 151-152, 166, 254-261, 272-276.)

The operator at the Shops tower keeps certain records, but the trainmen *do not register there.* (R., 154.)

Such operator or towerman has no control over the movements of trains, gives no orders or rights to trains, but simply throws switches for such movements. The "proceed" signal simply indicates to the engineer the line-up of the switches. It neither gives nor denies authority to move. For instance, when the signal shows a "proceed" indication, that signal gives a train no right to proceed, but is simply information that when such right to proceed is *otherwise and otherwheres obtained* the switches are properly set for such a movement. (R., 131, 151-154, 164-167, 209-212, 254, 261, 300, 312, 316-319.)

Pertinent rules make south-bound trains superior to north-bound trains, and *forbid the movement of a train from a double track to a single track until superior trains of the same class running in the opposite direction have arrived.* The obligation to keep out of the way of

superior trains is imposed upon inferior trains. (R., 132-133.)

Train Number Four left the Union Station a few minutes late. The operator had handed both conductor Eubanks and Engineer Kennedy a train order, advising them, among other things, that superior south-bound train Number One had engine No. 281. Eubanks and Kennedy read this order to each other. Kennedy mounted his engine and drove it along the double track to the Shops tower, during which time train Number One had not passed, *so that it became Kennedy's absolute, non-delegable duty in accordance with both the rules and established practice to stop said train at the end of the double track. This, without excuse or justification, under no unusual circumstances, he failed to do, and drove his train a few seconds later headlong into train Number One.* (R., 101-104, 126-141, 133-134, 151-152, 220, 254, 261, 268-276.)

We submit that these facts show clearly that the danger was open and obvious and the result so certain and imminent that Engineer Ken-

redy, as a matter of law, assumed the risk of the danger resulting from the admitted failure of his fellow servants to warn him that train Number One had not passed.

He was in a place where he could see sooner and better and more constantly than any one else. In broad daylight he had been a few minutes before the collision told that Number One had not come in, he was handed and read a train order enabling him to positively and unmistakably identify train Number One. The only thing he had to do to protect himself and the train was to follow the established practice, with which he was thoroughly familiar, and obey simple and reasonable rules which were nothing more or less than the embodiment of common sense into the practical operation of trains. *It was his absolute duty before leaving the double track to personally know that train Number One had passed.*

When he pulled out onto the single track beyond the Shops, the danger of that act and the inevitable consequences were so open and obvious that any person in the exercise of ordinary care would have known and appreciated the dan-

ger. With his eyes open to the full knowledge of all the facts, he deliberately entered the single track without ascertaining whether train Number One had passed, so that he is bound, as any reasonably intelligent person would have been, to have known that the collision was imminent and inevitable.

The facts found by the Tennessee Supreme Court clearly show that, applying the correct rule of law, Kennedy assumed the risk of the danger existing at and just prior to his death, so that his administratrix cannot recover therefor.

II.

Under the Federal Employers' Liability Act the limit of recovery is "compensation." The charge of the trial judge was not silent—not simply meager. It presented to the jury a rule to guide them, and that rule was erroneous. The award was not to be "compensation" as shown by the evidence, but "such pecuniary allowance therefore as in your opinion is warranted by the evidence." The excellent opinion

of the Court of Civil Appeals on this point will be found on pages 456-459 of the record.

The Supreme Court admits that this was error, but held that it was harmless error. (R., 540.)

It is not disputable that the measure of recovery under the Federal Employers' Liability Act is "compensation." *Chesapeake & Ohio v. Kelly*, 241 U. S., 485, 489; *New York Central v. Winfield*, 244 U. S., 147, 149.

Where a charge is erroneous, prejudice is presumed. *Fillippon v. Albion Vein Slate Co.*, 250 U. S., 76, 82.

There can be no presumption that there will be the same result when the law is followed and when the law is not followed. *Louisville & Nashville R. R. v. Greene*, 244 U. S., 522, 554.

Of course, the record does not and could not show the ratiocination of the jury. A litigant who relies on an error in the charge does not have to affirmatively show wherein prejudice resulted. Prejudice is presumed from the fact

of error. He who claims the error to be innocuous must point out wherein there was no prejudice. The record discloses no basis for the pure assumption that the error was innocuous. Indeed, it shows that Kennedy violated the usual custom and practice and his orders, hence was guilty of the grossest negligence (R., 126-128, 151-152, 166, 254-261, 272-276); that he was seventy-three when he died (R., 56, 64, 337-339, 340); that his widow was fifty-six years old and his two daughters twenty-one and twenty-three, respectively, and his son seventeen (R., 54, 57, 316); and that his widow continued to receive a pension of $30.00 per month from the Federal Government (R., 360).

With these undisputed facts before them, no court can, we think, assume the burden of saying that the jury would have rendered a verdict of the same size whether the measure of damages given them for their guidance by the trial judge was right or wrong. We have a right to go to trial with the law correctly charged.

Our jury system is predicated upon the belief that a jury will intelligently apply the law as given them by the court to the facts as they find

them from the evidence. To assume that the same result will be reached whether the instructions of the court are right or wrong is to deny the efficacy of and ultimately destroy the jury system.

There are, of course, many instances of innocuous error. But the instant case is not one of that character. A rule to guide the jury was given and that rule was inaccurate. The result, naturally, was wrong.

In a case predicated on a Federal Statute such as the Federal Employers' Liability Act, a defendant has the right to a trial before a jury wherein the measure of its liability is correctly stated. It is not a question of meagerness—of omission. A rule—a yardstick—was given and that rule was wrong. It is not sufficient to say that the jury might have reached the same conclusion even if the law had been given them correctly.

We respectfully ask that the case be reversed.

Respectfully submitted,

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